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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 FEDERAL REPUBLIC OF NIGERIA,
4 et al.,

Plaintiffs,

5 v.

20MC209

Telephone Conference

6 VR ADVISORY SERVICES, LTD., et
7 al.,

8 Defendants.

9 -----x

10 New York, N.Y.
October 22, 2020
11 2:00 p.m.

12 Before:

13 HON. PAUL A. ENGELMAYER,

District Judge

14 APPEARANCES

15 MEISTER SEELIG & FEIN LLP
16 Attorneys for Applicant
17 BY ALEXANDER DIMITRI PENCU
CHRISTOPHER JOHN MAJOR
18 AUSTIN DONG KIM

19 KOBRE & KIM LLP
Attorneys for Respondent
20 BY: ZACHARY DAVID ROSENBAUM
DARRYL G. STEIN

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(The Court and all parties appearing telephonically)

THE COURT: All right. Good afternoon, everyone.

This is Judge Engelmayer. I'm calling the case of Federal Republic of Nigeria, et al. versus VR Advisory Services, LTD, et al., 20MC409.

Let me begin by confirming my court reporter is on the line.

(Pause)

THE COURT: Good afternoon. Thank you for your service.

Who do I have for the applicants, the Federal Republic of Nigeria?

MR. MAJOR: Good afternoon, your Honor. This is Chris Major from Meister Seelig & Fein. We represent the applicants, the Federal Republic of Nigeria and its Attorney General, Malami. I'm joined by two colleagues, Alexander Pencu and Austin Kim. We've listed Mr. Pencu as the second potential speaker, although, it's our plan for me, your Honor, Chris Major, to do most of the speaking on behalf of the applicants.

THE COURT: Thank you, Mr. Major. Appreciated and welcome to your colleagues, as well.

Who do I have for VR Advisory?

MR. ROSENBAUM: Good afternoon, your Honor. Zachary Rosenbaum, Kobre and Kim. I am joined by my colleague, Darryl Stein, and Josef Klazen. It is our intention that I will argue

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1 the first point re in our application and Mr. Stein will argue
2 the second.

3 THE COURT: All right. Welcome to both of you.

4 All right. I have allocated an hour for this. We
5 have a hard stop at three o'clock. Before we get into the
6 merits of the dispute, I want to see if counsel have worked out
7 a resolution with respect to the Kobre & Kim Associates.

8 Mr. Rosenbaum.

9 MR. ROSENBAUM: It does not appear so, your Honor,
10 unfortunately. To answer the acute question that your Honor
11 posed, I think, again, unfortunately, the parties are in
12 agreement that even if your Honor rules on the issues that
13 we're going to argue today by November 1st, that will not
14 necessarily resolve the issue that we've presented with respect
15 to the impending employment of Mr. Barkhordar.

16 THE COURT: Mr. Rosenbaum, let me ask you a question
17 or two just about that issue. To begin with, I take it, just
18 very briefly, because I'm trying not to use up a lot of time on
19 this solvable issue that could be devoted to argument, but was
20 it Kobre & Kim or someone else who fronted the issue or
21 discovered the issue and reported it to the other side of
22 Mr. Barkhordar's having had some prior involvement in his
23 earlier barrister role with the issues at hand?

24 MR. ROSENBAUM: Our firm learned it had informed
25 counsel for applicants in this proceeding.

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1 THE COURT: Are you able to disclose how your firm
2 learned it?

3 MR. ROSENBAUM: I could. Unfortunately, your Honor, I
4 don't know that specifically, but I expect that it was in the
5 course of interviews.

6 THE COURT: I take it by the time that the issue had
7 arisen, he had already accepted a job offer at Kobre & Kim?

8 MR. ROSENBAUM: Correct, although, it's a conditional
9 offer. From what I am told, it was the applicant who informed
10 our firm of his prior employment and the intern informed
11 Nigeria.

12 THE COURT: The applicant, in other words, did the
13 right thing, as you see it, and was forthright about the
14 potential conflict presented by his earlier work?

15 MR. ROSENBAUM: He was forthright with us and we were
16 forthright with all counsel for Nigeria, recognizing that this
17 case spans across the globe, or at least to London.

18 THE COURT: Briefly, Mr. Rosenbaum, let's play out
19 each alternative scenario here. Let's assume, first of all,
20 that you get what you want, which is that the 1782 order is
21 vacated and there is no subpoena. Play out that scenario, and
22 that that was ruled on before November 1, why is it that, in
23 the proceedings before me, which, by definition, would have
24 terminated, there is any remaining issue as to Mr. Barkhordar's
25 employment.

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1 MR. GREENBLUM: My understanding, and the petitioners
2 can speak for themselves, obviously, but if your Honor ruled in
3 that fashion, which, of course, we believe the Court should,
4 there would be an appeal, and both for efficiency and other
5 reasons, we would expect to continue to represent our clients
6 on the appeal. There are potentially other matters that could
7 arise in the United States --

8 THE COURT: Wait a minute. Just to be clear, the only
9 application relevant before me involves the proceeding before
10 me and its appeal. I understand the theory that an appeal may
11 elongate the time, such that any ruling by me isn't a problem
12 solver, but one thing I'm not going to be doing is giving a
13 green light as to the effect on other proceedings of
14 Mr. Barkhordar's prior service. I can only really opine on
15 whether there is any disqualification in the matter before me
16 and its appellate sequel, but I understand your point, that
17 even if you win, in the event of an appeal, this matter, if you
18 will, is not over.

19 Play out now the other scenario in which you lose, and
20 that order is not vacated and the subpoena is upheld in its
21 entirety, just to choose the polar opposite scenario. I take
22 it the argument there would be that you would then be appealing
23 and the matter is not completed; correct?

24 MR. ROSENBAUM: Well, perhaps we would appeal, but
25 irrespective of an appeal, we have served responses and

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1 objections to the subpoenas that were served on the respondent,
2 those which we accepted for and would expect then to be
3 involved barring the outcome of an appeal in the discovery
4 process sought by the petitioners here. So, I think, in that
5 instance, it would result, in turn, in our continued
6 involvement very shortly or immediately after such a ruling,
7 which, of course --

8 THE COURT: All right. The relevant takeaway is that
9 the speed of my ruling, because of subsequent events arising
10 out of this petition and the action I take on it is no cure to
11 the problem here. So, if there is a cure short of
12 Mr. Barkhordar not taking employment, it's either the parties
13 reaching an agreement on a -- somebody is interrupting me, I'm
14 sorry. Is that the court reporter or otherwise?

15 (Pause)

16 THE COURT: Who was that? Who was that that just
17 tried to speak?

18 MR. ROSENBAUM: This is Mr. Rosenbaum. It was not me,
19 your Honor.

20 THE COURT: I'll state the obvious. This is a phone
21 call. You can't be interrupting anybody speaking, least of all
22 the judge. The court reporter needs to hear one voice and one
23 voice alone.

24 All right. So, I understand why my resolution may not
25 be, by November 1st, may not be a complete solution.

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1 Let me ask you, Mr. Major, briefly, why is it that the
2 screening mechanism, which, of course, is very familiar to New
3 York courts, as a means of avoiding exactly this sort of
4 problem, is not acceptable here?

5 MR. MAJOR: Thank you, your Honor. This is Chris
6 Major on behalf of the applicant.

7 First of all, your Honor, just to be clear, that was
8 not me interrupting. I was on mute and will continue to be on
9 mute unless I'm addressed by the Court. It sounded like
10 interference to me, not an attempt to interrupt. I just want
11 to make clear for the record that that was not me attempting to
12 interrupt.

13 So, to answer your question, your Honor, the screening
14 mechanism, we do not believe, is sufficient for a variety of
15 reasons.

16 Number 1, obviously, we are taking this information
17 from others because English lawyers were not involved in
18 London; however, our understanding is that the English lawyers'
19 declaration that was submitted to your Honor does not
20 accurately and fully state the level of involvement that he had
21 in this matter. Our understanding is that he was involved in
22 numerous strategy and consultation sessions with the client,
23 with other English counsel. He had access to strategy
24 memorandums and had, while it was a short period of time, it
25 was a very critical period of time in this case.

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1 In addition, we were advised that, while Kobre & Kim
2 is a relatively large law firm with lots of offices, its London
3 office is quite small. Our understanding is that's somewhere
4 in the high teens in terms of the number of lawyers. That, in
5 and of itself, makes the screening more difficult.

6 In terms of how this gentleman advised Kobre & Kim of
7 his prior involvement, we can't imagine that he was somehow
8 unaware that this was an issue that just crossed up. It's not
9 as if he learned subsequently that his prior firm had been
10 involved in a case. This is a proceeding involving what is now
11 a \$10 billion arbitration award. It certainly was something
12 that would be at the forefront of his mind while he was
13 listening in on all of these conferences and readings of
14 confidential, privileged memorandum.

15 The fact that he then subsequently went and
16 interviewed with Kobre & Kim is alarming, from a U.S.
17 perspective, in terms of a U.S. ethical rule. He went and
18 sought a job with the adversary on, what I would assume, was
19 the biggest case that he had any involvement with during his
20 prior employment.

21 So, our client here is entitled, under the U.S. rules,
22 to not just ensure that his confidential information is not
23 disclosed, and we're not comfortable that that would be the
24 case, but also, our client is entitled that there not be any
25 appearance of impropriety. They are defending against a

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1 \$10 billion arbitration award that has been set forth in our
2 papers through the Attorney General Malami's declaration. It
3 would be utterly devastating to the entire nation if you look
4 at it on a scale relative to its fiscal and economic
5 obligations.

6 So, given how critical this case is, given that we
7 think that the lawyer had access to very confidential, very
8 important legal consultation, and given the fact that we think
9 he has not properly disclosed that to your Honor in his
10 declaration is cause for great concern here, and that's why we
11 don't think that the screening mechanism would be sufficient.

12 In addition, your Honor, I think, at this point, there
13 really is -- it should not be anything before this Court. As
14 we understand it, and we hope Kobre & Kim has not employed this
15 gentleman yet, and therefore, there is nothing for us to do in
16 terms of, for example, seeking disqualification. Only at that
17 time would this Court have jurisdiction to issue a ruling.

18 This is really an issue that has to be determined in
19 England. The issue of whether an English law firm can hire an
20 English lawyer under the English ethical rules where that
21 English lawyer had been involved in an ongoing, high stakes,
22 and well-publicized litigation, the first step is whether or
23 not they can do that under English law, which, of course, I'm
24 not confident to comment on, but right now there is no ripe
25 issue before the Court.

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1 Kobre & Kim is asking the Court to give an advisory
2 opinion and to give it cover to hire this lawyer. Kobre & Kim,
3 when they interviewed this gentleman, in their small England
4 office, knew who the barrister was on the other side of the
5 case. Frankly, this firm and the English lawyer should not
6 have even interviewed, because they both knew about this issue
7 way back then. So, your Honor, our client feels strongly that
8 the screening mechanism would not be sufficient and we think
9 that, under the rules, our client's informed consent is
10 required, even if the screening mechanism is put into place.

11 Certainly, your Honor, I'll finish -- I'm sorry, your
12 Honor --

13 THE COURT: That's okay, you've finished. I've heard
14 enough. I'm really trying to use time for our argument.

15 Look, Mr. Rosenbaum, first of all, nothing that I can
16 do can reach beyond the scope of this proceeding, if, in fact,
17 as appears to be the case, this is one small chapter in a much
18 broader-running set of engagements between your clients and the
19 law firms here. Please understand that the most that this
20 Court could do would be limited to the 1782 proceeding. So,
21 Mr. Major makes an absolutely valid point that there are all
22 sorts of implications here that may exist for your firm and for
23 the lawyer, Mr. Barkhordar, that are untouched by anything that
24 I can do here.

25 So, that much ought to be crystal clear, that the ask

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1 here is really limited to, and the remedy here that I could
2 give would be limited to the 1782 proceeding, full stop.

3 What I do think would be useful for me would be to get
4 a detailed affidavit from Kobre & Kim describing to me of what
5 it knew and when it knew it with respect to the issues
6 presented here.

7 Mr. Rosenbaum, can I get that by the end of the day
8 tomorrow?

9 MR. ROSENBAUM: I believe so, your Honor. I'll confer
10 with my colleagues and we can inform the Court if there is any
11 reason we cannot, but I expect we can.

12 Additionally, your Honor, it is understood that this
13 Court's jurisdiction is limited to the proceeding before it,
14 but, in fact, there is a proceeding before this Court, and the
15 New York rules apply, and that is the purpose for which we're
16 sending this piece of it to this Court.

17 THE COURT: May I ask you, the employee says he
18 accepted the offer in September of 2020. I was first notified
19 of this issue on, I think, October 21st, 2020. When did Kobre
20 & Kim first become aware that this attorney had any connection
21 to relevant proceedings, Mr. Rosenbaum?

22 MR. ROSENBAUM: Your Honor, my review of our records,
23 our first communication with counsel, or the Federal Republic
24 of Nigeria, was September 28th, 2020, on this subject.

25 THE COURT: Kobre & Kim didn't notify the Court and

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1 didn't seek relief until 23 days later?

2 MR. ROSENBAUM: Correct, your Honor.

3 THE COURT: Help me why I'm supposed to help you with
4 that problem if you were dropping this on me that late? I'm
5 trying to understand, in other words, there is a think-fast
6 quality about the timing of the application here in relation to
7 oral argument. The case was pending and it looks like three or
8 four weeks were waited before I was notified that there was
9 this issue.

10 MR. ROSENBAUM: Understood, your Honor. It was the
11 discussion between counsel -- I think the expectation from our
12 firm was that it would be worked out and that it was not a
13 substantial issue, particularly because of the willingness to
14 screen. I can't speak specifically to the English rules of
15 ethical conduct, but I do think they are fundamentally more
16 permissive than the New York rules, and it was on that basis,
17 because New York is not as clear, that we sought to bring it to
18 your Honor's attention once we learned that it was something
19 that the petitioner in this case was unlikely to consent to.

20 THE COURT: Can I ask you this, I mean, reading
21 through the applicant's application, he was certainly aware of
22 the proceeding. Could he have been aware of the proceeding
23 during the time he did some work on it without being aware that
24 Kobre & Kim represented an opposite party? Mr. Rosenbaum.

25 MR. ROSENBAUM: I believe so, your Honor. I believe

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1 that he --

2 THE COURT: -- did not know about Kobre & Kim --

3 MR. ROSENBAUM: -- no, I believe he might have, but I
4 don't know that he did. So, I haven't met him. Perhaps that's
5 something that we can speak to in the declaration from our firm
6 that your Honor is asking for. In other words, I don't want to
7 surmise on facts that I don't know specifically.

8 THE COURT: I want to know, among other things, when
9 the firm first became aware that an applicant for it had
10 connection to this matter of the sort that he did, when the
11 applicant told the firm and when the firm otherwise became
12 aware of it.

13 Look, may I suggest, Mr. Rosenbaum, to state the
14 obvious, that, apart from any application here, the matter
15 before me is a small part of a much larger problem. You have
16 here a young person, relatively early in their career, who may
17 or may not want to get caught up in the maelstrom that may
18 ensue, independent of whatever I might decide here. I would
19 encourage you, after this call, to elevate the issues within
20 the firm and to make sure that the applicant or the conditional
21 offer holder is aware of the whirlwind that may surround these
22 issues. I want to make sure, before the road is traveled
23 farther, that there is visibility from both employer and
24 punitive employee about what may ensue here. Okay?

25 MR. ROSENBAUM: Sure. Okay. Yes, your Honor.

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1 THE COURT: With that, I think that is time enough for
2 this issue. We have 20 minutes per side, not 30. Let's begin
3 with you, Mr. Rosenbaum. Mr. Rosenbaum, I have some questions
4 for you, but I'm happy to hear a brief distillation of your
5 own. Go ahead.

6 MR. ROSENBAUM: Thank you, your Honor. And briefly,
7 to start, we searched high and low for any other example,
8 besides the Attorney General of the Federal Republic of Nigeria
9 entering the U.S. not through the MLAT process in seeking aid
10 under Section 1782 for a criminal investigation or a criminal
11 proceeding. It appears to us -- and the reason I'm only edging
12 slightly on that is because I don't know that we can search
13 every docket of every district court in the country, but we
14 searched high and low and found no other example, which I think
15 is quite telling.

16 THE COURT: But isn't the example, the previous one,
17 involving this very controversy? In other words, couldn't the
18 same have been said about the application before Judge
19 Schofield?

20 MR. ROSENBAUM: Yes, your Honor. That is one of the
21 handfuls that this issue perhaps could have been raised, but I
22 don't think, in any sense, that forecloses it being raised
23 here.

24 THE COURT: I'm only pointing out that it's not a null
25 said. It is indeed an uncommon occurrence that a sovereign

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1 entering under the MLAT process, I take that to be your point,
2 but it's not unheard of.

3 MR. ROSENBAUM: It's not unheard of, but what I'm
4 suggesting is, it's not unheard of for any MLAT signatory
5 except for Nigeria, that we've seen.

6 In that sense, there are two examples, one of which
7 your Honor is directly involved in this one, there is the one
8 before Judge Schofield, and there was the one in 2013 in the
9 Eastern District of Virginia, which was rejected on similar
10 grounds or referred to the same ground that we're seeking today
11 under the discretionary factors of Intel.

12 As we read the petitioner's papers, the gravamen of
13 their argument is not that the Court shouldn't exercise its
14 discretion, it is that the Court does not have discretion. We
15 think once your Honor concludes that the Court does have
16 discretion under the third Intel factor, that it's a relatively
17 easy analysis, given the comprehensive nature and purpose of
18 the MLAT and Section 1782.

19 THE COURT: Has Nigeria used the MLAT, to your
20 knowledge, in other cases?

21 MR. ROSENBAUM: We don't have visibility into that,
22 your Honor, so I do not know. I do not know whether they
23 attempted it here, and I do not know whether they attempted it
24 in any of the other examples that we've seen that resulted in
25 some public reporting.

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1 THE COURT: Go ahead.

2 MR. ROSENBAUM: So, in most analyses, we suggest the
3 most natural place to start is with the plain language of
4 Section 1782, and the plain language of the MLAT. As your
5 Honor is well aware, and it's well established, that the
6 district court in which person resides or shall/may -- and I'll
7 triple underscore, because that's the way it is in my notes --
8 may order him to produce discovery.

9 So, by its very nature, Section 1782 is permissive,
10 and Justice Ginsburg outlined in Intel, the third factor, which
11 is the one that we ask that the Court focus on here, that the
12 Court can and, we submit, should consider whether the 1782
13 request congeals with attempt to circumvent -- and I'm using my
14 own ellipses here -- policies of the United States.

15 THE COURT: May I ask you this, I mean, I understand
16 your theory that the mere fact that the existence of the MLAT
17 and the election not to use it suggests circumvention. I
18 welcome your focus on what the proposed subpoena actually
19 contains. Tell me, what does that reveal? In other words, is
20 there something about the nature of subpoena itself that says
21 to you, it would not have likely been approved or at least in
22 that scope, in the MLAT procedure. I'm trying to understand
23 whether we can get any mileage -- you can get any mileage out
24 of the nature of the request here in terms of revealing an
25 attempt to run the MLAT procedure.

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1 MR. ROSENBAUM: I do, your Honor, because I looked
2 both at the MLAT and in the DOJ's guidance. In the examples
3 that are given in DOJ's guidance, while documents are certainly
4 within the scope of the assistance under the MLAT, the key is
5 identification of the document. The DOJ even gives examples --
6 we attached it to our handbook or to our submission, but those
7 examples are typically tangible, like bank accounts and records
8 relating to it.

9 Here, you know, and this is -- it really frames, I
10 think, the overarching policy issue and our issue, which is,
11 the Attorney General, Malami, who is, in fact, the central
12 authority for purposes of the MLAT. And I'll note -- and I
13 don't need to read them all -- there are many instances of
14 "shall" in the MLAT. It is strewn with the word "shall," while
15 the 1782 has the permissive "may."

16 In that sense, Mr. Malami, Attorney General Malami is
17 attempting to use the convention, the very broad, sweeping
18 conventions of U.S. civil discovery with, I believe it's 56
19 separate requests that are being allocated, go well beyond the
20 specificity that would accompany a request for assistance by
21 the DOJ and are more in the vein of, you know, typical,
22 broad-based, sweeping civil discovery.

23 THE COURT: I understood your theory, though, to be
24 that the purpose, in fact, of the application here, less to be
25 in truth about a criminal investigation and more to do with

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1 undermining the existing arbitral award. To that point, are
2 there features of the 56 requests that, in your view, can only
3 be understood as aimed at undermining the arbitral award and
4 not at relevance in a criminal case?

5 MR. ROSENBAUM: I believe so. This was -- it falls
6 specifically into the second-for-use bucket. So, I would -- if
7 your Honor wants to hear about it now, I think it's probably
8 better suited for the category that Mr. Stein is prepared to
9 speak to, but the answer, your Honor, is yes. It appears to us
10 that the request, the 50-some-odd requests for any and all
11 documents in a variety of categories, go beyond an actual
12 subpoena for the criminal proceeding, and essentially a fishing
13 expedition to search for evidence --

14 THE COURT: Okay, but that's the conclusion. I'm
15 really trying to get -- and I don't much care whether it's you
16 or Mr. Stein who answers, but just with precision, what are the
17 several calls in the subpoena that, to you, are most clearly
18 indicative that the purpose is to undermine the arbitral award
19 as opposed to build a criminal case?

20 MR. STEIN: Hello, your Honor. This is Darryl Stein
21 from Kobre & Kim.

22 I think the clearest example for this is the request
23 of all documents and communications concerning the enforcement
24 of any award granted in the arbitration in connection with the
25 GSPA. This really exemplifies the breath of this request,

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1 which is aimed -- we cannot see any connection to the criminal
2 proceedings and the initial proceedings in Nigeria, which, I
3 think, themselves are somewhat [unintelligible] but there
4 really does seem there to be targeted only at sorting out and
5 adversaries litigation strategy and without any connection to
6 the investigations and proceedings in Nigeria.

7 THE COURT: What is your understanding, Mr. Stein, as
8 to, as best you can tell, the focus of the criminal
9 investigation?

10 MR. STEIN: It's a little bit difficult to tell, your
11 Honor. The way it's defined in the application is criminal
12 investigations and initial proceedings pending in Nigeria. In
13 the opposition to the motion to dismiss, they identified five
14 criminal proceedings involving certain individuals. It's
15 unclear to us what the scope is of either of those
16 investigations. I think one of the issues that we had and one
17 of the problems with the application is that, that failure to
18 specify what the ongoing proceedings are, having not identified
19 them by party name, by case number, and even saying that the
20 list that they provided, the examples they provided are not
21 evolved, it's somewhat difficult. We haven't seen, I think,
22 other situations where an application is quite as vague as to
23 what the supposed foreign proceedings are.

24 THE COURT: Let me ask you, Mr. Stein, I mean, I
25 understand that evidence has been adduced of payments that have

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1 been made that at least are suggestive of some, or are perhaps
2 consistent with an attempt to corrupt. I understand those two
3 have been made more at the earlier stage of the contracting
4 process and not at the arbitral enforcement process. Are you
5 aware, from your involvement of the case, of any payments that
6 have been made, or anything that is untoward getting to the
7 arbitral enforcement. In other words, once the arbitral award
8 is involved, has there been any suggestion of illegality,
9 impropriety from that point forward in the chronology?

10 MR. STEIN: I don't believe that there are any
11 allegations as to the role of when VR and P&ID became involved
12 in this.

13 One thing, I think it's important to note, the
14 arbitration rules issued in early 2017, the respondents had no
15 connection to P&ID before that date, the allegations that have
16 been made against the initial contracting. I note Nigeria has
17 made a number of allegations, and those are the subject of the
18 proceedings that are going to be taking place in England, that
19 I'm not aware of any allegations concerning misconduct and the
20 enforcement of the award.

21 THE COURT: When did VR acquire a quarter of P&ID?

22 MR. STEIN: I don't have the date in front of me in
23 which they finished the opposition. In connection with the
24 other 1782 proceeding, we've discussed this with counsel for
25 Nigeria. What we told them is that the discussions between VR

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1 and P&ID only started in August of 2017, which is several
2 months after the arbitrational award was issued.

3 THE COURT: But the documents that are being sought
4 from VR predate 2017?

5 MR. STEIN: It appears to be. I'm sorry, your Honor.

6 THE COURT: Go ahead. In other words, I'm trying to
7 understand the materials that are sought from VR presupposes
8 they're a custodian of records that predate when the
9 discussions began between VR and P&ID; is that correct?

10 MR. STEIN: I believe it's helpful to look at the
11 request in two categories. I think the first category are the
12 requests we have focused on before, which are those requests
13 aimed at sorting out the litigation strategy against Nigeria.
14 So these are the documents concerning the enforcement of any
15 award.

16 There is a second category of documents, which it
17 seems as though Nigeria's supposition is that VR might have,
18 because P&ID previously had them and they attached this exhibit
19 claiming that the documents were destroyed in 2016, and that
20 seems to be part of the basis for their application here. Of
21 course, the timeline for that doesn't match up, and to the
22 extent that Nigeria is seeking documents, that are really P&ID
23 documents, you know, that's an example of a situation where
24 discovery would not usually be -- or it wouldn't go against a
25 grant of discovery when the real party for whom discovery is

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1 sought is a party to the foreign proceeding.

2 THE COURT: All right. I want to give you a few
3 minutes to reply, you've got about five minutes left of your
4 20. So, what I would propose to do, Mr. Rosenbaum and
5 Mr. Stein, unless you have something specific you would like to
6 put on the table before I turn to Nigeria, I propose that we
7 turn to Nigeria.

8 I did have one process question I want to ask, but let
9 me just, before I do that, is there anything further you want
10 to put on the table, Mr. Rosenbaum, before I turn to Nigeria?

11 MR. ROSENBAUM: No, your Honor. We appreciate a few
12 minutes to rebut.

13 THE COURT: Thank you. Let me ask you the one
14 question, which is, the application for discovery lists a
15 Richard Dietz as an officer or director, and also VR Capital
16 Group. It doesn't look to me as if your submission lists them
17 as one of the respondents. It's unclear where they fit in.
18 Did you mean, by your response, to capture the entirety of the
19 respondents here?

20 MR. ROSENBAUM: No. There were -- there are eight
21 enumerated respondents, we have appeared on behalf of six. The
22 reason for that is we accepted service for those six on the
23 basis that they can be found in this jurisdiction and the other
24 two cannot. We had some email exchanges with counsel for the
25 petitioner and, to my knowledge, the petitioners have not

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1 advanced efforts to serve those other two respondents with
2 process.

3 THE COURT: So, formally, if your application to
4 vacate were granted, would it -- although the logic of any
5 ruling like that, conceivably, could logically run to the
6 benefit of those two people, perhaps. As a formality, would I
7 be vacating the entirety of the application or only such part
8 as ran to the six who you represent?

9 MR. ROSENBAUM: Well, I think, as a matter of
10 procedure, it would run into the six. I think there would
11 likely be collateral estoppel issues if there is an attempt as
12 to the other two. But, as to those two, there is a separate
13 basis under 1782 because, we would submit, they're not found in
14 this jurisdiction, and that was the basis on which we were not
15 authorized to accept service.

16 THE COURT: I mean, I suppose the point would be that
17 when and if those people are served and surface, it's for them
18 to oppose, and if they oppose, at that point, whatever the
19 arguments are about the relationship between any ruling here
20 and them could be ventilated.

21 MR. ROSENBAUM: Agreed, your Honor.

22 THE COURT: All right, with that, Mr. Major, I'm happy
23 to turn to you.

24 MR. MAJOR: Thank you very much, your Honor.

25 Before I start my argument, I want to make a factual

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1 point. Your Honor had asked if there were payments after the
2 arbitration and after the arbitration award. I would point the
3 Court, please, to 27-1 on this docket, which is the recent
4 English judgment. Prior to that, at page 20 of that document,
5 that's the ECF pagination, paragraphs 121 and 122 discuss --
6 and this was, obviously, the high English court, which found a
7 strong prima facie case of fraud, it cites payments to
8 Ms. Taiga, the government lawyer charged with reviewing the
9 GSPA, which is the agreement that gave rise to the arbitration.
10 It recites payments to Ms. Taiga in 2017, 2018, and 2019.

11 I just wanted to make sure the record was clear on
12 that actual point.

13 THE COURT: Are those payments in connection with
14 arbitral enforcement? What is she up to at that point?

15 MR. MAJOR: Your Honor, obviously, I don't know what
16 was in Ms. Taiga's head or the payor's head, but the
17 implication, I think, is that it was either, you know, hush
18 money, knowing that the investigation had commenced in Nigeria,
19 I think that is a likely and a very reasonable conclusion to
20 draw, but, of course, I don't know what exactly the quid pro
21 quo was. The fact that, while the Nigerian Economic and
22 Financial Crimes Commission was investigating the fraud, and by
23 then, the funds that had bought P&ID, the shell company that
24 holds the award, while they were attempts enforcement,
25 Ms. Taiga is receiving sums that are of multiple of an annual

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1 salary in Nigeria for a government employee. Those payments
2 are, to state the obvious, highly suspicious, and I think
3 indicative of her failure of cooperation, whether that be
4 through an affirmative cooperation or to her remaining silent.

5 THE COURT: What I don't understand is where she fits
6 in into the events necessary to achieve enforcement.

7 MR. MAJOR: So, your Honor, obviously, she received
8 payments at the time she was approving the contract, and her
9 daughter received payments, but the EFCC was investigating this
10 fraud at that time. So, she's receiving additional payments,
11 probably to induce her not to tell the EFCC what she knew,
12 which was that it was fraudulently procured, that there was
13 nothing behind the company that got this GSPA, that there was
14 no proper due diligence performed, that it wasn't channeled
15 appropriately within the Nigerian government. All of those
16 things, the perpetrators of the fraud and the subsequent
17 acquirers of the fraudulent award knew that those types of --
18 that type of information could undo the award. Look what
19 happened in England. They are now facing a fraud trial, and
20 the court in England has already found that there is a strong
21 case of prima facie fraud, in part based on the investigation
22 concerning Ms. Taiga.

23 So, I think that it appears to have been unsuccessful
24 because Nigeria was able to gain this information, including
25 through the other Section 1782 proceeding that was brought, but

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1 it appears to me that the intent was to try to keep her from
2 cooperating or otherwise speaking and providing information to
3 the investigation that could ultimately lead to criminal
4 prosecutions of the perpetrators of the fraud.

5 THE COURT: Thank you. That's responsive and helpful.

6 Just as to VR Advisory, what's the basis for the
7 premise that they are custodians of documents that predates the
8 date on which your adversary said discussions first began with
9 them and P&ID?

10 MR. MAJOR: It's our expectation that if VR Advisory,
11 for example -- and VR Capital was the other purchaser of the
12 entity holding the award. They, presumably before spending a
13 considerable amount of their investors money on this award,
14 would have done some form of due diligence, would have had some
15 communications with persons who were involved with the
16 arbitration with the underlying fraud, perhaps. We haven't
17 heard from VR Advisory or the other respondents that they have
18 no such documents. They're trying to evade having to produce
19 documents and, presumably, the manner in which they contested
20 this proceeding demonstrates that, in fact, they know they have
21 documents.

22 THE COURT: Wait a minute. Wait. Wait. Wait. Wait.
23 Enough. The question I asked you is what the basis is for your
24 premise that they have the documents and the thrust of your
25 answer is due diligence, I get that.

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1 The fact that a party opposes production of documents
2 or opposes a subpoena does not mean anything, other than
3 they're standing on their legal rights. I'm not inferring
4 something from somebody standing on their legal rights.

5 All right, let's turn to the MLAT. In Nigeria, who is
6 it that would have to approve a request for an MLAT? What's
7 the position or the title? Is it the Attorney General?

8 MR. MAJOR: Yes, your Honor. Obviously, I'm not an
9 expert on Nigerian law or exactly how the law enforcement rules
10 work there, but, presumably, that would be Attorney General
11 Malami.

12 THE COURT: We have limited time. I'm not sure why
13 you're not expert on that, since that is really a central
14 argument the other side made, but your clients include the
15 Attorney General; correct?

16 MR. MAJOR: Correct, your Honor.

17 THE COURT: What efforts did your client make before
18 filing the 1782 to pursue an MLAT as to the VR Advisory?
19 Please be as detailed as you can.

20 MR. MAJOR: Your Honor, I'm not aware of any effort,
21 at all, to pursue an MLAT.

22 THE COURT: Did your client reach the conclusion that
23 such an MLAT would be fruitful?

24 MR. MAJOR: No.

25 THE COURT: Did your client consider an MLAT?

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1 MR. MAJOR: Not to my knowledge.

2 THE COURT: Why did your client not consider an MLAT?

3 MR. MAJOR: Because, your Honor, the discovery that
4 we're taking in the first Section 1782 proceeding and this
5 Section 1782 proceeding don't require any special skill or any
6 unique pursuits that would require engagement with the
7 Department Of Justice. The MLAT is --

8 THE COURT: I'm sorry, I used to work for the
9 Department Of Justice and get MLATs all the time to other
10 countries. It wasn't that I had a special skill, but it was
11 that I was a criminal prosecutor investigating a crime to which
12 foreign evidence was relevant. There is nothing special about
13 that. It's just following smoke to see where there is fire.

14 You need to answer the question. Would an MLAT not
15 have worked here? Did Nigeria have a policy of not using the
16 MLAT treaty? I need an answer for why that was foregone.

17 MR. MAJOR: Your Honor, it was foregone because
18 Section 1782 is available to Mr. Malami and Nigeria. There is
19 nothing in the MLAT that could or would restrict Attorney
20 General Malami's use of Section 1782. That is something that
21 is --

22 THE COURT: Sorry. Sorry. Sorry. I understand that
23 you chose to do 1782, that's evident in your choice of the use
24 of 1782. I'm trying to understand whether the judgment was
25 that an MLAT would be less effectual. In other words, maybe

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1 the Attorney General was unaware of the MLAT -- I suppose I
2 would ask about that. Was your client aware of the existence
3 of the MLAT procedure at the time your client chose to pursue
4 1782?

5 MR. MAJOR: I would think, of course, your Honor.
6 Yes.

7 THE COURT: So, on the assumption that your client was
8 choosing what way to proceed, do you have any insight in the
9 reasoning your client had in not first pursuing relief under
10 the MLAT?

11 MR. MAJOR: Yes, your Honor. We can get these orders
12 very quickly, as your Honor knows. Your Honor gave us the
13 Section 1782 order quickly. The suggestion by the other side
14 is that we should have gone through the Justice Department and
15 then had the Justice Department file a Section 1782. That
16 doesn't coincide with the twin purposes of the statute, which
17 are efficient discovery, and I say Section 1782, efficient
18 discovery, and also to encourage other countries to follow suit
19 and also give cooperation to foreign proceedings, including
20 proceedings in the U.S.

21 THE COURT: Can I ask you a question? That logic
22 would apply literally in every case where a foreign government
23 is seeking to build a criminal case. They could, in any case,
24 say, you know what, those courts are faster than those DOJ
25 bureaucrats, let's not use the MLAT because we're experiencing

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1 that judges are quicker, and we don't have to go through the
2 search-and-review and approval mechanisms in DOJ.

3 Is there something that distinguishes this case from
4 other criminal cases that a foreign sovereign might want to
5 bring through the use of American evidence?

6 MR. MAJOR: Your Honor, there would be some
7 distinction with other cases, but the point is not there was
8 something special about this case that leads it to Section
9 1782, it's the respondent's claim or they speculate that,
10 somehow, relief would have been denied under the MLAT. If you
11 look at article 3 of the MLAT, the four enumerated basis for
12 denying assistance, none of them apply to what the respondents
13 have argued here. In article --

14 THE COURT: Sorry. What is Nigeria's experience,
15 though, with seeking assistance under the MLAT treaty with the
16 U.S.?

17 MR. MAJOR: Your Honor, I don't know what the
18 historical experience has been. As counsel for the respondents
19 have noticed, that would be things that are not necessarily a
20 matter of public record, and so I can't --

21 THE COURT: Wait a minute. Your client is the
22 Attorney General. Your client is party to a treaty with the
23 United States governing mutual assistance in criminal matters.
24 I'm asking you why your client has forgone this. The answer is
25 because those courts, under 1782, are faster. I'd ask you to

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1 distinguish this case from other cases and why that wouldn't
2 invite world wide ignoring of MLATs by any other criminal
3 sovereign. You've been unable to distinguish the case. I've
4 asked you whether or not Nigeria has had a bad experience with
5 MLATs, you told me you can't answer. I need some help here.

6 MR. MAJOR: Your Honor, the burden is the not on us to
7 demonstrate why the MLAT is not the sole proffer for us here.
8 We have a right, under Section 1782, that right is not
9 disturbed at all by the MLAT. The statutory requirements of
10 Section 1782 have been met. The Court found that when it
11 issued its order --

12 THE COURT: Sorry. Sorry. Mr. Major, the Court found
13 that on the basis of your ex parte application. This is
14 exactly why the adversarial system is such a wonderful part of
15 the American legal system; I get to hear from the other side.

16 One of the things I learned, that I didn't know from
17 your submissions, but which I learned from the other side, was
18 the representation that was made to Judge Schofield in which
19 you said, or your client told Judge Schofield that it was,
20 quote, rank speculation that an applicant might seek to use the
21 materials produced in those proceedings in, quote, other
22 proceedings. According to your adversary, that turned out to
23 be untruthful.

24 Is it factually correct that the materials that were
25 elicited from the earlier 1782 proceeding were, in fact, used

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1 in other proceedings?

2 MR. MAJOR: There were a few transfers that were
3 discovered in Judge Schofield's Section 1782 proceeding that
4 were in accordance with Second Circuit precedent, and it's
5 permissible, that were submitted to the English court.

6 At the time of that briefing that your Honor
7 references, no documents had been produced. We didn't know
8 what documents we were going to get, we didn't know how the
9 Federal Republic of Nigeria would view those, or where, in what
10 proceedings, they would be useful.

11 So, the Second Circuit has been clear, though it is
12 permissible for the recipient of documents to use them in other
13 foreign proceedings and, in fact, the Eleventh Circuit has even
14 found you can use them in subsequent U.S. proceedings --

15 THE COURT: I'm focusing on your honesty before --
16 your client's honest before Judge Schofield. In the
17 application to Judge Schofield, you talked about people in
18 Nigeria who engaged in corruption, some of whom are former
19 Nigerian public officials that received bribes at P&ID. That
20 was the information you were seeking through the 1782
21 application. It's the sort of information that you say that,
22 when you got it, surprised you, though, and you therefore
23 turned it over, but before Judge Schofield, you said it was
24 rank speculation, and you did just that.

25 Did your law firm represent Nigeria in the application

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1 before Judge Schofield?

2 MR. MAJOR: Yes, your Honor.

3 THE COURT: Why did you tell her it was rank
4 speculation that you would do what you did with the evidence
5 you were seeking?

6 MR. MAJOR: Because we did not know what we would
7 receive in response or how it would be used. We're not in any
8 of the foreign proceedings. We're obviously not doing the
9 Nigerian investigation, we're not the English barristers
10 presenting evidence to the English court, we did not know what
11 we were getting. The other side was arguing that the 1782
12 should not be permitted because the material might be used
13 otherwise. We argued that we can --

14 THE COURT: Actually, the other side didn't oppose the
15 1782. They sought access to the materials and you sought to
16 deny that to them by making your rank speculation point.

17 The problem I'm having, among many things, is the
18 atomization of the representation of Nigeria where Nigeria is
19 essentially not harming with you with information about what
20 its other representatives will do with the information it gets.

21 So, I'm ascribing to you good faith in telling Judge
22 Schofield that, of course my client wouldn't do that with the
23 evidence or bribes that we're seeking, and then Nigeria turns
24 around and does it, and the defense is, we poor little local
25 American counsels didn't know that our client would do that.

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1 The problem is now Nigeria is now back before me. Why isn't a
2 compelling discretionary factor under the Intel factors that
3 Nigeria has blown its credibility with the Southern District of
4 New York?

5 MR. MAJOR: Your Honor, respectfully, I do not think
6 that they've blown their credibility --

7 THE COURT: I'll be the judge of that. Why should I
8 treat them as honorable, when they said to Judge Schofield they
9 were seeking exactly the evidence that they got?

10 MR. MAJOR: Your Honor, the investigations that are
11 ongoing in Nigeria have yielded evidence that has then been
12 used in the English courts, but there is nothing impermissible
13 about that. That is not -- the discretionary factors do not,
14 you know, it covered this type of information where I don't
15 think that the Court can say that I -- first of all, I don't
16 think that Nigeria has blown its credibility with the Southern
17 District of New York. That's not one of the discretionary
18 factors for the Court to consider.

19 THE COURT: I can consider whether it's an end
20 runaround or other proof-seeking mechanisms and so forth.
21 Presumably, one issue is whether I can bank what
22 representations Nigeria is making to me, and one of the better
23 indications of that is whether their representations to Judge
24 Schofield proved accurate.

25 MR. MAJOR: Your Honor, we argued to Judge Schofield

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1 not that it was just speculation at that point in time about
2 where the materials may be used, but we argued that we had the
3 entitlement under Second Circuit precedent for the materials to
4 be used in other foreign proceedings. There is nothing
5 impermissible about that.

6 THE COURT: May I ask you, I note that this time
7 around, although the argument is that you're seeking the
8 information from VR Advisory, principally for criminal
9 proceedings, this time you are not ruling out the secondary use
10 of that material in the English proceedings; is that correct?

11 MR. MAJOR: Yes, your Honor, and I don't think we
12 ruled it out. I understand the rank speculation, but our
13 point, at that point in time, was that it was not known where
14 it was going to be used, but we did not rule it out. We argued
15 that it could be used in other foreign proceedings. We made
16 that argument, we cited the case law, and I just want to
17 emphasize that point because, obviously, when candid to the
18 Court, when called into question, that raises a large concern
19 for us, but we were not saying that it wouldn't be used. What
20 we were saying is that the argument, at that point in time, had
21 no factual basis.

22 THE COURT: May I ask you, if you weren't seeking the
23 information from VR for a criminal investigation purpose, but
24 solely for the English proceedings, would 1782 be available to
25 you for that use?

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1 MR. MAJOR: Yes, your Honor, absolutely.

2 Another point about the speculation was, what was
3 happening in England at the time of that briefing, was that the
4 Federal Republic of Nigeria was trying to get permission to
5 bring the case. Now we know from the English judgment that was
6 handed down a few weeks ago, they can bring that case and will
7 bring that case. Therefore, it is likely, that if there is
8 fruitful information discovered, that it will not only be used
9 for the foreign investigation that's going on in Nigeria, but
10 it will also be used in the English court as the Second Circuit
11 explicitly permits.

12 If I can make one point about the overall argument
13 that the respondents have, they're telling your Honor --
14 they're asking you to make a discretionary call. That's not
15 all that they're asking. They're asking your Honor to find
16 that there a blanket prohibition against the Attorney Generals
17 of other countries in using Section 1782. That is completely
18 contrary to the statute --

19 THE COURT: I mean, maybe that's their intention. I
20 didn't read their papers that way.

21 Let me ask you just to their point. Other than the
22 applications from Nigeria, have you been able to find examples
23 where a foreign criminal prosecutor, not Nigeria, was granted
24 judicial assistance under 1782 without availing themselves of
25 the MLAT procedure first?

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1 MR. MAJOR: No. The only thing that holds otherwise
2 is the case in the Eastern District of Virginia was wrongly
3 decided. The quote from the case, it says that it miscites or
4 misrecites the Intel factor, factor 3. It circumvents the
5 procedure that the Government of the United States or the
6 Government of the Republic of Nigeria had established referring
7 to the MLAT, but the Intel factor actually says it circumvents
8 the foreign proof gathering restrictions or other policies of a
9 foreign state of the U.S.

10 I think your Honor's question a little earlier raised
11 this point, which is, is there a policy of the U.S. that would
12 prohibit the production of these documents that we're asking
13 for, and there is. The Section 1782 permits it. Counsel for
14 the respondent here conceded that we met the statutory
15 requirements in the earlier Judge Schofield proceedings.

16 So the statutory factors having been met, the
17 respondents are searching for a way to somehow delay or avoid
18 discovery and citing to the MLAT, but the MLAT, by its own
19 terms, provides no limitation under Section 1782, and quite to
20 the contrary, article 19 specifically says that it does not
21 limit procedures of other law, including, obviously, the
22 statutes of the United States.

23 THE COURT: Okay. Thank you, Mr. Major. Just brief
24 couple of minutes of rebuttal, if any, from Mr. Rosenbaum.

25 MR. ROSENBAUM: Your Honor, I'll be very brief because

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1 I know the Court is pressed for time.

2 The third intel factor is an attempt to circumvent
3 policies of the United States. The linear policies of the
4 United States that are actually memorialized in the MLAT, I
5 think there was some discussion around one or two, but I think
6 I did put a fine point on it. For example, as I mentioned,
7 Attorney General Malami is the central authority. The MLAT
8 proscribes that these central authorities, meaning Mr. Malami
9 shall, not may, communicate directly with each other, meaning
10 he shall communicate with the U.S. central authority for the
11 purposes of this treaty.

12 So, further --

13 THE COURT: I'm sorry, Mr. Rosenbaum, that's just
14 process. In terms of the output that would likely have arisen
15 had Nigeria pursued the MLAT, is there some reason to think
16 that emerging from the MLAT process would be a more
17 stripped-down, approved set of document or information
18 requests?

19 MR. ROSENBAUM: I believe so, your Honor, for the
20 reasons I outlined earlier. The structure of the MLAT and the
21 DOJ guidance does not call for, in my view and from what I've
22 seen, these types of sweeping requests. There is more
23 specificity towards the documents requested, not a broad
24 category, but -- so that's specific here.

25 As to some of the more sweeping issue, first of all,

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1 we are not seeking an outright prohibition. We've said, on
2 multiple times, that we are seeking to exercise the Court's
3 discretion. Supreme Court juris prudence going back centuries
4 requires that the Court put a treaty and statute on equal
5 footing, and whenever possible, reconcile that.

6 Here, when you look at the specificity of the MLAT,
7 the standard procedure, as it appears for every MLAT
8 participant, except for Nigeria, even some of the permissive
9 pieces of an MLAT, for example, the U.S. central authority, in
10 this instance, may deny -- this is article 3, section 1, sub
11 part D., if the executioner requests, and is contrary with our
12 constitution, which we talk about in our papers, but also if
13 there was prejudice with security or other essential national
14 interests of the state.

15 Now, we do not know, we, as VR, do not know whether
16 that could or would be the case, but that's the exactly why the
17 first stop in this sequence, we submit, as a matter of
18 expression, not as a matter of prohibition, should be and
19 universally is, except here, through the MLAT with the DOJ.

20 THE COURT: Let me ask you this, I mean, you're not
21 saying that the MLAT requires, in every case, that it be used
22 ahead of any civil statute, like 1782. You're saying that
23 that's the ordinary course. There's no law that literally
24 holds what you are saying, that the MLAT has to take priority.
25 You're describing committee and general practice, but not some

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1 legal prohibition; right?

2 MR. ROSENBAUM: Correct. We're urging the Court to
3 reconcile the treaty with the permissive. That's why I
4 underscored it at the outset, the nature of 1782, and we think
5 the way to harmonize that is with sequence, not prohibition.

6 THE COURT: If the U.S. Justice Department approved
7 three out of the 50-some-odd document calls here and didn't
8 approve the rest, and Nigeria then said, you know what, on top
9 of those three, there are five, or six, or seven we really,
10 really want, and we're going to pursue those under 1782.

11 Wouldn't your first argument be, you can't do that, you went
12 through the MLAT and the MLAT procedure resulted in your being
13 limited to just three, not the additional seven or so?

14 MR. ROSENBAUM: Your Honor, I believe we would be
15 still in the discretionary realm of 1782, not the mandatory.
16 So, yes, I can't imagine a world in which we wouldn't make that
17 argument, but we would make it as a matter of discretion. I
18 think the key to this is the Court would, in that instance,
19 have the benefit of the DOJ's reasoning in exercising its
20 discretion, which is why we submit -- and I can't think of a
21 reason contrary to this, which is why I think it is the
22 universal practice --

23 THE COURT: I'm sorry. Why would you have the benefit
24 of DOJ's reasoning? If DOJ turned away certain requests, would
25 that ordinarily be made known to the subpoena recipient, or

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1 would all that would that be made known be that DOJ had
2 approved the three document calls that it approved?

3 MR. ROSENBAUM: Well, I think we naturally know it
4 because that presupposes that Nigeria would then come back
5 apart from the -- if I'm understanding the hypothetical
6 correctly, if Nigeria would come back to the court to 1782 and
7 seek the other two.

8 THE COURT: No. What typically would happen in an
9 MLAT would be, if the MLAT process only resulted in the
10 approval of a small subset of what Nigeria was seeking, that
11 would be what VR Advisory would be ordered or would be
12 subpoenaed to produce pursuant to the MLAT, but there wouldn't
13 be some internal administrative opinion coming out of DOJ that
14 VR Advisory would know of, to the effect that DOJ had chosen
15 not to approve the lie and share of what was proposed to it.
16 You might discover that through informal discussions or perhaps
17 you might be compelled to in a later 1782 proceeding if the
18 Court asked you the question, but in the ordinary course, I
19 don't think it would be visible to you what DOJ had not
20 approved, only that which it had approved.

21 MR. ROSENBAUM: I agree with that, your Honor. I may
22 have been misconstruing the hypothetical. I thought there was
23 a second leg of it where Nigeria subsequently sought the other
24 two or ten that were rejected by the DOJ through a direct
25 1782 --

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1 THE COURT: Right. The issue would then be you
2 wouldn't necessarily know. You would presumably then say, hey,
3 you should go to the MLAT for that, too, and then maybe it
4 would get smoked out that that had already been tried.

5 Can you conceive of any circumstance where any foreign
6 executive branch could justifiably not pursue an MLAT in the
7 first instance?

8 MR. ROSENBAUM: Meaning in a criminal proceeding?

9 THE COURT: Yes.

10 MR. ROSENBAUM: I think that -- I can't conceive of
11 one. There perhaps would be, and I think, in some
12 circumstances, the Court certainly could exercise its
13 discretion to allow it. We submit that, where there is an
14 MLAT, and, again, as a matter of discretion and sequence, the
15 Court should exercise discretion at first to have Nigeria first
16 exercise its right through the MLAT, which, by the way, as we
17 all know, then typically results in a 1782 proceeding that's
18 advanced by the U.S. Department of Justice.

19 THE COURT: One final question for you. You heard me
20 question your adversary about the representation that was made
21 to Judge Schofield. I take it your firm was not involved at
22 that stage?

23 MR. ROSENBAUM: Our firm was involved. My colleagues
24 on the line were directly involved. I believe we were the
25 recipients of the representation, yes.

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1 THE COURT: Right, but at that time, though, I thought
2 the subpoena was directed at -- was it directed at VR advisory?

3 MR. ROSENBAUM: Yes, it was directed at certain
4 financials institutions. We were involved on behalf of P&ID in
5 that proceeding, but we were not representing any of the
6 subpoena recipients.

7 THE COURT: When the statement was made that it was
8 rank speculation, what do you understand of the context of that
9 proceeding at that time, that to connote.

10 MR. ROSENBAUM: To me, that would connote that counsel
11 was informed that there was no intention to use that
12 information in the English proceeding. I don't know any other
13 way to interpret this.

14 THE COURT: The information that was sought, I mean, I
15 read the papers, as you can tell, to be seeking information
16 including, quote, bribe payments, meaning things of value and
17 so forth. Did what was produced in response to the 1782 depart
18 from what was forecast or sought in the declaration seeking the
19 1782 by Nigeria?

20 MR. ROSENBAUM: From what I understand, the request
21 was somewhat broad, but there were bank records and it was bank
22 records that were produced. I don't know if that fully answers
23 your Honor's question. I only want to provide what I know.

24 THE COURT: -- speculation that really potent evidence
25 would be produced, as opposed to bank records that were a

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1 nonevent. I'm trying to figure out whether the word "rank
2 speculation" can be justified on the grounds of, sure we were
3 hoping to get a smoking gun, we never really were anything more
4 than speculating that was there, and lo and behold, we got it.

5 MR. ROSENBAUM: Yes, but I would submit, your Honor,
6 yes, then it's just a fishing expedition. In other words, that
7 would call into question the entire purpose for that 1782
8 application. I mean, you can't just serve a subpoena on any
9 bank in any part of the world in a hope of turning something
10 up. You have to have a good-faith basis to do it. I think
11 it's only in that context that the Court can consider what was
12 meant by rank speculation at that time.

13 THE COURT: Thank you, counsel. Very helpful,
14 spirited argument on both sides. I'll take this under
15 advisement. In the first instance, we need to come to terms
16 with the issue involving the employee. Kobre & Kim, I think
17 you need to give some hard, internal thought and discussion
18 with that employee just to make a judgment about what's best
19 for him and the firm. In the short-term, if there isn't a
20 resolution reached, I will need what I sought from you.

21 All right. Thank you, counsel. We stand adjourned.

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